

**BEFORE THE WORKERS COMPENSATION APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CRAIG S. ANDERSON

Claimant

V.

CUSTOM CLEANING SOLUTIONS

Respondent

AND

AMERICAN INTERSTATE INS. CO.

Insurance Carrier

Docket No. 1,070,269

ORDER

Claimant requests review of Administrative Law Judge Rebecca Sanders' September 2, 2014 preliminary hearing Order. John J. Bryan, of Topeka, appeared for claimant. Timothy G. Lutz, of Overland Park, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the judge and consists of the September 2, 2014 preliminary hearing transcript and exhibits thereto, the August 29, 2014 deposition transcript of Vernon Peters, RN, and exhibits thereto, and the August 29, 2014 deposition transcript of Andrew D. Barnes, RN, in addition to all pleadings contained in the administrative file.

ISSUES

The judge concluded claimant refused to comply with respondent's post-accident alcohol testing policy. As such, the judge found claimant forfeited benefits under the Kansas Workers Compensation Act.

Claimant requests reversal, listing 15 issues in his Petition for Review and seven issues in his brief, some of which overlap. Highly summarized, claimant argues he did not refuse to submit to a post-injury alcohol test. Claimant asserts K.S.A. 2013 Supp. 44-501(b)(1)(E) is unconstitutional. Respondent maintains the Order should be affirmed.

The issues for the Board's review are:

1. Did claimant forfeit workers compensation benefits by refusing to submit to a post-accident alcohol test, pursuant to K.S.A. 2013 Supp. 44-501(b)(1)(E)?
2. Is K.S.A. 2013 Supp. 44-501(b)(1)(E) unconstitutional?

FINDINGS OF FACT

Claimant began working for respondent on April 11, 2014. That day, he was provided a copy of the employee handbook and executed the following acknowledgement:

I hereby acknowledge that I have received a copy of the CCS Group, LLC Employee Handbook. I understand that I am responsible for reading the Employee Handbook.¹

Section 230.d of the employee handbook states:

CCS reserves the right to request that you submit to random, post accident, or periodic drug and alcohol testing or when, based on observed behavior or other information, there is reason to believe that your use of drugs or alcohol is in violation of the Drug and Alcohol Free Workplace Policy.²

While claimant admitted receiving the employee handbook, he testified he did not read it prior to his accident and was unaware of respondent's policy regarding post-accident drug and alcohol testing.

On June 23, 2014, claimant and multiple other employees were working inside a grain silo where they were pumping wet cement to make sloped concrete walls. Claimant was working about one foot away from his coworkers most of the day in the silo.

Claimant was asked to assist Randy, the pump operator, in cleaning out what the parties and witnesses referred to as a concrete pump.³ Claimant began spraying water in the top of the pump grate to loosen the concrete. According to claimant, he asked Randy how to get the concrete off and was told to turn the pump on. While they had a few other words, claimant did not "know what was actually said."⁴ Claimant indicated Randy left in the Bobcat.[®] Thereafter, claimant turned on the pump and raised the metal grate to expose tubes and metal paddles. While spraying those, he looked away to speak to a coworker and fractured his second and third right metacarpals when he inadvertently got his hand caught in the auger.⁵

¹ P.H. Trans., Resp. Ex. E.

² *Id.*, Resp. Ex. F at 16.

³ It appears this device actually pumps wet cement. Dried concrete residue must be cleaned from the pump.

⁴ P.H. Trans. at 12.

⁵ Respondent's safety policy requires the auger to be turned off when cleaning the pump and the pump operator must be present.

Claimant was immediately taken to Stormont-Vail emergency room by Jace Jacobs, respondent's site supervisor. Mr. Jacobs denied smelling alcohol on claimant the day of the accident. Claimant testified at no time during the ride to the hospital did Mr. Jacobs say anything to him about taking a drug and alcohol test. Claimant indicated his pain level upon entering and exiting the hospital was a 10 on a 0-10 pain scale.

Ms. Schulz, respondent's Vice-President of Operations and Safety and Operations Director at the time of claimant's accident, indicated she was contacted by Mr. Jacobs while he and claimant were en route to the hospital. She advised Mr. Jacobs she would contact the hospital about post-accident testing. Ms. Schulz indicated when she first spoke with the charge nurse at the hospital, she only requested a drug test.

Upon arrival at the hospital, Mr. Jacobs indicated he had conversations with hospital personnel about drug and alcohol testing, but claimant was not present. Mr. Jacobs testified respondent's policy is "if there's any kind of an injury where someone has to be taken to the hospital, there's a drug and alcohol mandatory test."⁶ Mr. Jacobs did not believe Stormont-Vail was aware of respondent's policy because respondent had never taken any workers there before. Mr. Jacobs indicated he was at the hospital for about 20 minutes before returning to the job site.

Andrew Barnes is a registered nurse in the emergency room at Stormont-Vail and was the charge nurse on the day of claimant's accident. Nurse Barnes testified he was contacted by a woman for respondent who indicated she was sending information over for collection of a urine drug screen. After Ms. Schulz reviewed respondent's drug and alcohol testing policy, she called Stormont-Vail and asked for an alcohol test. At the time, she was unaware Stormont-Vail tested for alcohol using a "blood draw."⁷

Nurse Barnes indicated the paperwork he received from respondent requested a drug screen and an alcohol test which he then gave to the emergency room physician, who ordered the tests. Nurse Barnes testified a urinalysis was done on claimant around 3:35 p.m., with the results coming back at 4:12 p.m. The sample was negative for illegal drugs.

Vernon Peters is a registered nurse in the emergency room at Stormont-Vail. He treated claimant on the day of the accident. Nurse Peters testified he did not notice any odor of alcohol on claimant. Nurse Peters was informed by Nurse Barnes that the employer had requested an alcohol test. He was told to inform the claimant they were going to obtain a blood sample to perform the test. Nurse Peters indicated Stormont-Vail performs drug tests by urinalysis and alcohol tests by blood draw. In describing his conversation with claimant around 5:23 p.m., Nurse Peters testified:

⁶ P.H. Trans. at 61.

⁷ *Id.* at 84.

I informed him that we needed to draw a little more blood to be able to test for alcohol, and he stated that he - - his employer had - - or his supervisor had been in the room and I believe his supervisor advised that he wasn't needed to test for the alcohol.

Then I proceed to tell him that, according to what I've been told, we needed to do the test for alcohol and it required a blood sample, and at that time he refused to give a blood sample. And I explained to him several times to the point to where he actually got angry with me because I was trying to push the issue that it was a work related injury . . . and that the employer was requesting this and that it was for his benefit that he perform the test just due to the fact then I explained to him that work comp could possibly decline the claim just due to him refusing the alcohol.⁸

Nurse Peters testified he believed claimant understood what he was telling him, but stated claimant declined the test because, according to claimant, "his supervisor, or whoever the person was that was there, told him that he did not need to perform the test."⁹ Nurse Peters made the following notation in claimant's chart:

Pt refuses to have his blood drawn for Alcohol test. It is explained to the pt that his employer is the one requesting this to be done. Pt still refuses to have this test done. It is also explained to him that since this happened while at his work place that it would be in his best interest to have this done. Pt continues to refuse this test.¹⁰

Claimant testified that as of the date of his injury, he was unaware of respondent's drug and alcohol testing policy. He denied that the nurses asked him to take a blood test for alcohol, instead testifying that the blood test was for surgical purposes and he was not supposed to have surgery until after the swelling in his hand dissipated.

After he initially left Stormont-Vail, Mr. Jacobs returned to the hospital for about 20 minutes on two more occasions. Mr. Jacobs indicated during his second visit to the hospital, he had a conversation with claimant about the testing. In describing the conversation, Mr. Jacobs testified:

- A. I just remember there was some kind of a problem between Craig and one of the nurses and being upset about having to take more tests and, you know, I - - being it was a new hospital, I'd never taken anybody, I didn't know how they performed the test, so - -

⁸ Peters Depo. at 8-9.

⁹ *Id.* at 10.

¹⁰ *Id.*, Resp. Ex. 1 at 2.

- Q. Okay. And what was your response to Mr. Anderson?
- A. I didn't know - - you know, I didn't know what the - - you know, their policy on how they got the test.
- Q. Did you ever at any time tell Mr. Anderson or imply to Mr. Anderson that he didn't have to submit to a drug or alcohol test?
- A. No.¹¹

Mr. Jacobs testified claimant should have known respondent's post-accident drug and alcohol testing policy because he reads it page by page with all new employees.

Shortly after 5:26 p.m., Nurse Peters advised Nurse Barnes that claimant had refused to have his blood drawn for the alcohol test. Around 5:33 p.m., Nurse Barnes approached claimant to stress the importance of having it done. Nurse Barnes summarized his interaction with claimant as follows:

- A. . . . I would have introduced myself . . . and I said Vernon brought to it to my attention that you don't want your blood drawn for this . . . and I reiterated that because it's a work related injury that there's a possibility that compensation may not be granted if you refuse to have that done.
- Q. Anything else?
- A. I recall him saying that something to the effect of, you know, he wasn't concerned about it.¹²

Following his conversation with claimant, Nurse Barnes made the following notation in claimant's chart:

Leadership rounds completed. Pt still refuses to have a serum alcohol level drawn. Ron, PA, is at the bedside to complete splinting.¹³

Nurse Peters testified he was in the room with claimant and Nurse Barnes when claimant declined to have the alcohol blood test. Both Nurse Peters and Nurse Barnes testified claimant refused to submit to a blood alcohol test and that claimant's denial that he was ever asked to submit to such test or that he never refused such test was contrary to what occurred.

¹¹ P.H. Trans. at 65.

¹² Barnes Depo. at 24.

¹³ Peters Depo., Resp. Ex. 1 at 2.

Nurse Peters acknowledged he had no reason to suspect claimant was under the influence of alcohol and he never smelled alcohol coming from claimant.

Claimant acknowledged being asked by hospital staff to submit to a blood draw, but testified it was his recollection the test was not for the purpose of alcohol testing and “was supposed to be for a surgery and we wasn’t having surgery that day.”¹⁴ Claimant indicated there would have been no reason for him to decline having blood drawn for an alcohol test because he was not impaired at the time of his accident.

According to claimant, around the time he was being released from the hospital, Mr. Jacobs showed up with an accident report. Claimant testified Mr. Jacobs did not request he submit to an alcohol test nor did anyone at respondent ask him to submit to a drug or alcohol test. According to claimant, other employees were not required to submit to drug or alcohol testing after being injured on the job.

On June 26, 2014, claimant underwent a right hand open reduction internal fixation, followed by a revision second metacarpal open reduction internal fixation on August 1, 2014. Respondent is currently accommodating claimant’s light duty restrictions.

Brian Thompson is a former employee of respondent. Mr. Thompson suffered a right hand injury on May 30, 2014, while cleaning out a concrete pump or pump mechanism. He told respondent he did not need any medical treatment. While Mr. Thompson testified he was not asked by respondent to submit to a post-accident drug test, he admitted he did not request medical treatment following his accident. After respondent terminated his employment on July 9, 2014, he requested medical treatment and was then asked by respondent to submit to a post-accident drug test on July 10, 2014.

Ms. Schulz testified respondent’s policy is to require both drug and alcohol testing following every accident. She testified Mr. Thompson did not immediately submit to testing because she “was not notified of that injury until later.”¹⁵

Following presentation of evidence, the judge ruled:

In this case the employer had a policy that clearly authorizes post injury testing. Claimant refused at least twice to alcohol testing. Therefore, Claimant has forfeited rights to benefits under the worker’s compensation act.

It is not clear from the evidence what procedure Claimant didn’t follow that caused his injury.

¹⁴ P.H. Trans. at 43.

¹⁵ *Id.* at 81.

Claimant was asked to clean the pump. Concrete was stuck on parts of the pump that were located under a screen. When Claimant lifted the screen the parts were moving. As Claimant was attempting to clean the pump his right hand got caught in the auger.

Claimant's supervisor thought Claimant had told him to keep the screen or the grate down and the pump should be turned off, when cleaning the auger.

It is not clear from the evidence that Claimant had been specifically instructed to keep the grate or screen down unless the pump is turned off.

There is insufficient evidence to show Claimant failed to follow proper procedure and that failure caused his accidental injury. However, Claimant refused to take a post accident alcohol test in accordance with a clearly stated employer policy and has forfeited his right to benefits.¹⁶

Thereafter, claimant filed a timely appeal.

PRINCIPLES OF LAW

K.S.A. 2013 Supp. 44-501(b)(1)(E) states:

An employee's refusal to submit to a chemical test at the request of the employer shall result in the forfeiture of benefits under the workers compensation act if the employer had sufficient cause to suspect the use of alcohol or drugs by the claimant or if the employer's policy clearly authorizes post-injury testing.

K.S.A. 2013 Supp. 44-501b(c) states:

The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2013 Supp. 44-508(h) states:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

¹⁶ ALJ Order (Sept. 2, 2014) at 5.

K.S.A. 2013 Supp. 44-534a(a)(2) states, in part:

A finding with regard to . . . whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board.

A plain and unambiguous statute should be applied based on its express language and not read in a manner that adds something not contained therein.¹⁷ *Bergstrom*¹⁸ makes it clear that using plain meaning when interpreting statutes is paramount.

“Administrative agencies are creatures of statute and their power is dependent upon authorizing statutes, therefore any exercise of authority claimed by the agency must come from within the statutes. There is no general or common law power that can be exercised by an administrative agency.”¹⁹ The Kansas Workers Compensation Act is substantial, complete, and exclusive, covering every phase of the right to compensation and of the procedure to obtaining it.²⁰

ANALYSIS

1. Claimant refused a chemical test at respondent’s request.

The word “refusal,” in the context of refusing an employer-requested chemical test, is not defined in the Kansas Workers Compensation Act. In *Seybold*,²¹ this Board Member previously analyzed the meaning of “refusal” for a chemical test by looking at how the Kansas Supreme Court defined the word “refusal” in the context of K.S.A. 44-518:

The better method to discern the meaning of “refusal” is to look at Kansas Supreme Court precedent precisely concerning the definition of “refusal” in the context of our workers compensation law. This Board Member sees no reason to define “refusal” for K.S.A. 2012 Supp. 44-501(b)(E) purposes any differently than the Kansas Supreme Court defined “refusal” for K.S.A. 44-518 purposes in *Neal*.²²

¹⁷ *Redd v. Kansas Truck Ctr.*, 291 Kan. 176, 188, 239 P.3d 66 (2010).

¹⁸ *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 607-608, 214 P.3d 676 (2009).

¹⁹ *Acosta v. Nat'l Beef Packing Co., L.P.*, 273 Kan. 385, 396, 44 P.3d 330 (2002) (quoting *Legislative Coordinating Council v. Stanley*, 264 Kan. 690, 706, 957 P.2d 379 (1998)).

²⁰ See *Jones v. Continental Can Co.*, 260 Kan. 547, 557, 920 P.2d 939 (1996).

²¹ *Seybold v. Simplex Grinnell*, No. 1,067,611, 2014 WL 889883 (Kan. WCAB Feb. 18, 2014).

²² *Neal v. Hy-Vee, Inc.*, 277 Kan. 1, 81 P.3d 425 (2003).

The very nature of the language used in 44-518 suggests that before suspension of benefits, there must be an affirmative act on the part of the employee to frustrate the employer's discovery or examination. In our interpretation of 44-518, we follow a familiar maxim of statutory construction which provides: "Ordinary words are to be given their ordinary meaning, and a statute should not be so read as to add that which is not readily found therein or to read out what as a matter of ordinary English language is in it. [Citation omitted.]" *GT, Kansas, L.L.C. v. Riley County Register of Deeds*, 271 Kan. 311, 316, 22 P.3d 600 (2001).

Black's Law Dictionary defines "refusal" as "[t]he act of one who has, by law, a right and power of having or doing something of advantage, and decline it." Black's also indicates that the declination of a request or demand, or the omission to comply with some requirement of law, be "*as the result of a positive intention to disobey*." (Emphasis added.) *Refusal* is often coupled with "neglect," but Black's notes that neglect signifies a mere omission of a duty "*while 'refusal' implies the positive denial of an application or command, or at least a mental determination not to comply*." (Emphasis added.) Black's Law Dictionary 1282 (6th ed. 1990).

"Obstruct" is defined as "[t]o hinder or prevent from progress, check, stop, also to retard the progress of, make accomplishment of a difficult and slow.... To impede." Black's Law Dictionary 1077 (6th ed. 1990).

The ordinary meaning of the words used in K.S.A. 44-518 contemplate a positive intention to disobey and to hinder. We believe K.S.A. 44-518 contemplates circumstances where an employee makes a deliberate decision not to attend the examination or to obstruct or prevent the employer from gathering its own independent evaluation of his medical condition. Thus, the Board's interpretation that there must be an element of willfulness or intent is consistent with the ordinary meaning of the words of K.S.A. 44-518.

. . .

Based upon the cases cited above and the clear import of K.S.A. 44-518 we, like the Board, conclude that the terms "refusal" and "unnecessarily obstructs" carry with them an element of willfulness or intent.²³

²³ *Id.* at 15-16.

Neal utilizes the plain meaning rule made clear in *Bergstrom*. This Board Member associates a “refusal” with intent to not do something required.

In this case, claimant – according to both Nurses Barnes and Peters – refused to submit to the blood alcohol test that was requested by respondent. Their testimony and the records they generated documenting claimant’s refusal are persuasive. Under the plain language of K.S.A. 2013 Supp. 44-501(b)(1)(E), claimant forfeited benefits under the Kansas Workers Compensation Act.

This Board Member does not find convincing claimant’s version of events – that the blood test concerned surgery and there was no reason to do the test because no surgery was impending. The nurses were on the “same page” that the blood test to detect alcohol was offered to claimant, but he refused.

Claimant argues respondent’s drug and alcohol testing policy did not clearly authorize post-injury testing because claimant did not clearly agree to voluntarily submit to such testing. Such argument renders the statute meaningless. Claimant’s consent to the test is not the issue. Claimant also argues respondent’s policy merely reserved to it the right to request post-accident drug and alcohol testing and did not require mandatory testing. This argument does not impact the fact that respondent had a written policy authorizing testing, it requested testing and claimant refused to comply with the request.

Claimant argues K.S.A. 2013 Supp. 44-501(b)(1)(E) should be read as including a rebuttable presumption that a worker’s drug or alcohol use contributed to the work injury, such that the worker could avoid forfeiture by presenting evidence that his or her accidental injury was not due to drug or alcohol use. Claimant properly notes there was no evidence he was under the influence of alcohol on the date of accident. However, claimant’s request that we graft language on to what the legislature crafted, or read the statute differently than it is written, is contrary to *Bergstrom* and *Tyler*.²⁴

Claimant also argues respondent is estopped to assert K.S.A. 2013 Supp. 44-501(b)(1)(E) unless it advised claimant in advance that he would lose workers compensation benefits if he refused to submit to a blood alcohol test following an accidental work injury. Claimant argues respondent has a statutory duty, under K.S.A. 44-5,101, to tell him about his workers compensation rights. Such statute indicates an employer is to provide employees with informational material prepared by the Division of Workers Compensation, which includes information about forfeiture of benefits when a worker refuses to submit to a chemical test requested by the employer. This Board Member is aware of no statute or precedent supporting claimant’s argument.

Claimant refused the blood alcohol test. Forfeiture of benefits is the result.

²⁴ See *Tyler v. Goodyear Tire & Rubber Co.*, 43 Kan. App. 2d 386, 391, 224 P.3d 1197 (2010).

2. The Board lacks jurisdiction to consider constitutionality arguments.

Claimant also makes a number of arguments centering on the Kansas Workers Compensation Act and K.S.A. 2013 Supp. 44-501(b)(1)(E) being unconstitutional for violating due process and equal protection, as well as whether a drug test is an unreasonable search and seizure prohibited by the Fourth Amendment. The Board is not a court established pursuant to Article III of the Kansas Constitution and does not have the authority to hold an Act of the Kansas Legislature unconstitutional. The constitutionality of K.S.A. 2013 Supp. 44-501(b)(1)(E) cannot be ruled upon by this Board Member. Claimant may preserve any arguments for future determination before a proper court.

CONCLUSIONS

The current evidence proves claimant refused respondent's request for a chemical test. While it is a harsh result, especially considering there is no evidence claimant was impaired by alcohol on the date of his accidental injury, the plain language of K.S.A. 2013 Supp. 44-501(b)(1)(E) results in claimant forfeiting benefits.

WHEREFORE, the undersigned Board Member affirms the September 2, 2014 preliminary hearing Order.²⁵

IT IS SO ORDERED.

Dated this _____ day of October, 2014.

HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

c: John J. Bryan
janet@ksjustice.com

Timothy G. Lutz
tlutz@wallacesaunders.com

Honorable Rebecca Sanders

²⁵ By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.